Bowling Green-Warren County-Community Hospital Corporation d/b/a The Medical Center at Bowling Green, Kentucky *and* Kentucky Nurses Association, affiliated with the American Nurses Association. Case 9-CA-17467

21 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 September 1982 Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

The Respondent contends that its grant of previously unscheduled and indefinite wage increases to nonunit employees, while withholding the wage increases from the registered nurses, was lawful under the Board's holdings in, inter alia, *Singer Co.*, 199 NLRB 1195 (1972), and *Uarco Inc.*, 169 NLRB 1153 (1968). While we agree with the Respondent that *Daybreak Lodge Nursing Home*, 230 NLRB 800 (1977), cited by the judge, may be distinguished on its facts because *Daybreak* involved a denial of a definite benefit to an individual employee due to union activities, we find no merit in the Respondent's contention that its denial of the wage increase to the petitioned-for registered nurses was lawful under our holdings in *Singer*, supra, and other cases.

In *Singer*, and many other cases, we set forth the axiom that an employer must grant or withhold benefits during a period of employee union activities in the same manner as it would in the absence of those activities. Further, when an employer grants or withholds a benefit after the commencement of Section 7 activity, it must have an explanation for the timing of its action other than the presence or absence of union activities, such as a declaration to the employees prior to the onset of union activities of a wage increase definite in amount to be implemented at a particular time. Where an employer, prior to the commencement of Section 7 activities, announces to the employees that it intends to grant a benefit, but leaves the amount and time to be determined at its discretion after a condition precedent which is to occur subsequently (such as completion of a wage survey), the foregoing principles are put under a strain. In this last situation, we have held that when an employer proposes to its employees a wage increase to be awarded in the future after it conducts a wage survey, and in the interim the employees begin organizational activities, such as the filing of a representation petition, the employer does not violate the Act or commit objectionable conduct if it then tells the employees that it cannot exercise its discretion to determine the amount and time of a wage increase pending the outcome of the union activities or election. See, e.g., *Uarco Inc.*, supra. Here, however, the Respondent failed to follow this course.

In this case, the Respondent announced to all its employees that it was conducting an area wage survey to determine what wage adjustments it would implement at a future date. After the Union filed a representation petition for a unit of registered nurses, the Respondent received the results of its wage survey. Since the amount and time of the wage increases had been left to the Respondent's discretion in the original announcement, it had the option of taking no action at all. Instead, the Respondent exercised its discretion by awarding wage increases to the group of employees outside the petitioned-for registered nurse unit. In effect then, it denied increases to the unit employees because of their exercise of Section 7 rights, i.e., the pending election. We find that the denial of the wage increases pursuant to the prior announced wage survey to employees in a petitioned-for unit reasonably tended to interfere with the employees' Section 7 rights and thereby violated Section 8(a)(1). We further find that the Respondent's admitted motive for its conduct was discriminatory and indeed did discriminate against the employees in the petitioned-for unit in violation of Section 8(a)(3) of the Act. We also find, finally, that the Respondent's silence, with respect to the reason for its denial of the increases to the petitioned-for employees, did not negate the unlawful discriminatory impact of its conduct.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bowling Green-Warren County-Community Hospital Corporation d/b/a The Medical Center at Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge: This case was tried before me on August 18, 1982, at Bowling Green, Kentucky. The charge was filed on September 28, 1981,[1] by Kentucky Nurses Association, herein called the Union. The complaint issued November 3, 1981, alleging that Bowling Green-Warren County-Community Hospital Corporation d/b/a The Medical Center at Bowling Green, Kentucky, herein called the Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act. More particularly the complaint alleges that the Respondent denied its registered nurses a pay raise which it implemented for all other employees because they joined, supported, and assisted the Union.

The General Counsel and the Respondent were represented at the hearing and were afforded full opportunity to be heard, present evidence, and argue. Both the General Counsel and the Respondent filed briefs. Upon the entire record and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Kentucky corporation with an office and place of business in Bowling Green, Kentucky, has been engaged as a health care institution in the operation of a hospital providing in-patient and outpatient medical and professional care services for the general public. During the past 12 months, the Respondent in the course and conduct of its business operations derived gross revenues in excess of $500,000 and purchased and received at its Bowling Green, Kentucky facility products, goods, and materials valued in excess of $50,000 from points outside the State of Kentucky. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The hearing occurred without the presentation of testimony by witnesses and was tried on the basis of documents and a stipulation. According to the evidence thus supplied the following occurred:

On January 21, 1981, the Bowling Green-Warren County Community Hospital Corporation board of directors met in regular session. At this meeting Chairman Joel Rodgers reported that the Salary, Wage & Benefit Committee had recommended that the Respondent "proceed as rapidly as possible to implement the framework of the Meidinger Plan[2] and to refer the Meidinger Plan to [the] administration and [to] the Finance committee for their recommendation on salary percentage changes for future augmentation of the plan." The committee's recommendations were approved.

On March 5, the Union filed a petition to represent all registered nurses at the Respondent's facility. On March 13, Administrator of the Medical Center John C. Desmarais contacted his counsel by letter advising him that the hospital employees had been informed of the Meidinger study through postings on bulletin boards and by discussions with department heads. Specifically, Desmarais states that, although the employees had not been advised of the date or of the dollar amounts involved, they were advised of changes to be made, obviously a promise of wage increases. Desmarais then voiced his doubt as to the appropriateness of implementing the wage increase for the employees who were to be included in the bargaining unit in the upcoming election, i.e., the registered nurses. He added, significantly:

> Balancing this concern, however, is my desire to not penalize other hospital departments and employees who deserve adjustments.

On March 17 the Respondent's counsel replied, in relevant part, that if Desmarais had already announced the amount of the wage increase and the date that it was to become effective he was bound to effectuate the announced wage increase. Counsel advised further that since Desmarais had not announced the specific amount of increases nor the date of implementation he should withhold the implementation of the Meidinger Plan insofar as "employees petitioned for by the KNA" are concerned in order to avoid an unfair labor practice charge but to implement the plan, that is grant the wage increases to nonunit employees.

On April 1, in accordance with the advice of counsel, wage increases were awarded to the Respondent's other employees but were withheld from the registered nurses "so as not to upset the laboratory conditions in the election scheduled for May 14, 1981." Thus, it is admitted that but for the advent of the Union and the representation election which was scheduled the registered nurses would have received a wage increase as had the other employees. It has long been held that it is a violation of Section 8(a)(1) and (3) for an employer to deny a scheduled wage increase to its employees because of the pendency of a union campaign,[3] and in accordance with case law I find that a violation was committed in the instant case.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act and a health care

[1] Hereafter, all dates refer to 1981 unless otherwise noted.

[2] A study to determine if wage increases should be granted to the Respondent's employees.

[3] *Daybreak Lodge Nursing & Convalescent Home*, 230 NLRB 800 (1977), enfd. 585 F.2d 79 (3d Cir. 1978). Similarly, it is of no consequence that the violative act was pursuant to advice of counsel. *G.C. Murphy Co.*, 223 NLRB 604 (1976).

institution within the meaning of Section 2(14) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding scheduled wage increases from employees because of the Union's campaign and the forthcoming representation election, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent unlawfully withheld scheduled wage increases, I shall recommend that the Respondent be required to grant to each employee such wage increases as would have been granted in the normal operation of its facility, and make whole each such employee for any loss of benefits suffered by reason of the Respondent's unfair labor practices.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[4]

The Respondent, Bowling Green-Warren County-Community Hospital Corporation d/b/a The Medical Center at Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding scheduled wage increases from employees because of the Union's campaign and the forthcoming representation election.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Grant the scheduled wage increases for employees discriminated against as found above, and make them whole for any loss of earnings they may have suffered by the Respondent's failure to grant such increases earlier. Interest on moneys owed said employees are to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651.[5]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to analyze the amount of backpay due and the rights of employment under the terms of this recommended Order.

(c) Post at its location in Bowling Green, Kentucky, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withhold scheduled wage increases for employees because of the Union's campaign or because of representation proceedings which may be pending.

WE WILL grant the scheduled wage increases for employees discriminated against by us and make them whole.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

BOWLING GREEN-WARREN COUNTY-COMMUNITY HOSPITAL CORPORATION D/B/A THE MEDICAL CENTER AT BOWLING GREEN, KENTUCKY